90-710

No.

Supreme Court, U.S.
FILED
NOV 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This Petition arises under the Miller Act, 40 U.S. Code § 270 subsections (a) and (b), which provide, *inter alia*, for the general contractor's providing a payment bond for subcontractors and materialmen involved in the construction of United States government public works. It further provides, under 40 U.S.C. § 270(b), that suits on said bond shall be brought in the United States District Courts and not elsewhere.

This Petition thus presents the following question of federal jurisdiction under the Miller Act:

> Does the Superior Court of the State of California have jurisdiction over the subject matter of an action on such a bond where the plaintiffs additionally allege a violated agreement not to plead the statute of limitations and bad faith and fraudulent breach of such an agreement?

THE PARTIES

Your petitioner, defendant below, is St. Paul Fire and Marine Insurance Company, a Minnesota corporation. The parent corporation of St. Paul Fire and Marine Insurance Company is St. Paul Companies, Inc., a Minnesota corporation. St. Paul Fire and Marine Insurance Company has no subsidiaries.

Respondent is the Superior Court of the State of California for the City and County of San Francisco.

Real parties in interest and plaintiffs are James Lee Jones; Far West Painting and Construction; and Percell-Jones Construction. Their capacities have never been averred.

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No.

In the Supreme Court

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OCTOBER TERM, 1990

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

St. Paul Fire and Marine Insurance Company, a Minnesota Corporation, petitions for a writ of certiorari to review the judgment of the California Superior Court, City and County of San Francisco, Department Number Nine, as to which review was denied by the California Court of Appeal and the California Supreme Court.

OPINIONS BELOW

The rulings of the Supreme Court, Court of Appeal and trial court have not been published. The orders, all entered without opinion, appear as Items 1, 2, and 3 in the Appendix, pp. A-1, A-2, A-3.

JURISDICTION

The judgment sought to be reviewed was entered by the California Supreme Court on September 19, 1990. There has been no proceeding or order for rehearing and no extension of time in which to petition for certiorari.

Jurisdiction is founded upon 28 U.S. Code § 1257(a) in that all state courts below have held that they have jurisdiction in spite the clear wording of the Miller Act, 40 U.S. Code § 270(b), to the contrary. This, in effect, is a holding drawing in question the validity of a statute of the United States and holding invalid petitioner's immunity from suit on a Miller Act bond in state court as provided by said statutory section.

Interlocutory rulings of the highest court of a state on the issue of subject matter jurisdiction are final judgments for purposes of review by this court. *Madruga v. Superior Court* 347 U.S. 556, 74 S.Ct. 298, 98 L.Ed.290 (1954); *Bandini Petroleum Co. v. Superior Court* 284 U.S. 8, 14-16, 52 S.Ct. 103, 76 L.Ed. 36 (1931); *Local No. 438 Construction and General Labor Union, AFL-CIO v. Curry* 371 U.S. 542, 546-552, 9 L.Ed.2d 514, 83 S.Ct. 531 (1963). The sole issue in the appellate court below was the jurisdiction of the court over the subject matter of the case and this case falls squarely within the rule of the cited cases.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves the provisions of the Miller Act, 40 U.S. Code § 270a and § 270b. (App. A-7.)

STATEMENT OF THE CASE

This case arises upon the pleadings and the court's denial of petitioner's motion to dismiss, supported by declarations, for lack of subject matter jurisdiction. In their second amended complaint, real parties in interest allege, in what petitioner contends is artful pleading to avoid the allegation that the bond in suit is a Miller Act bond, as follows:

A. The status of defendant St. Paul Fire and Marine Insurance Company (hereinafter referred to as "St. Paul") as an insurer.

B. The existence of fictitious defendants.

C. The mutual agency of the defendants.

As a first cause of action plaintiffs allege:

1. Feinstein Construction Company, defendant's principal, entered into a construction contract with the United States Navy and provided a payment bond from defendant. Plaintiffs as subcontractors are third party beneficiaries of the bond.

2. At all relevant times the bond was in effect and plaintiffs had complied with their subcontracts.

3. Defendants had superior knowledge regarding payment bonds and related matters including the statute of limitations and were a fiduciary with regard to plaintiffs.

4. Defendant's principal failed to pay plaintiffs and filed bankruptcy.

5. Defendants denied plaintiffs' claim on August 9, 1984, and said denial was wrongful.

6. Thereafter, plaintiffs told defendant that only a portion of the claim was disputed and demanded payment of the undisputed portion. Defendant told plaintiffs it would reconsider the claim when the disputed portion was resolved by an investigation by the United States, and the parties made an oral agreement that defendant would not plead the statute of limitations.

7. In February 1989, the dispute was still not resolved and plaintiffs again made demand on defendant, but defendant cited the statute of limitations and refused to pay.

8. Plaintiffs' alleged damage in the amount due under the bond by reason of defendant's breach of its agreement.

9. Plaintiffs' performance of all conditions of the agreement.

The second cause of action alleges:

1. The parties made an oral contract whereby plaintiffs would refrain from pursuing a cause of action under the bond in return for defendant's reconsideration of the claim at a later point.

2. The implication in such a contract of a covenant of good faith and fair dealing whereby defendant would not unfairly deny plaintiffs the benefits of the bond.

3. Plaintiffs were vulnerable and relied upon defendant's superior knowledge and the defendant stood in a fiduciary relationship.

4. Plaintiffs performed their obligations by refraining from further pursuit of their claims.

5. Defendant breached the obligation by failing to pay and urging the statute of limitations defense and by failure to investigate the claims and causing plaintiffs to incur litigation.

6. Simple compensatory damages in an amount equal to the benefits payable under the bond, plus interest.

7. Plaintiffs' physical and emotional distress.

8. Plaintiffs' incurring medical expenses.

9. Plaintiffs' loss of employment and income.

10. Plaintiffs' retaining of an attorney.

11. Defendant's conduct was despicable, fraudulent and was done with willful and conscious disregard of plaintiffs.

The third cause of action alleges:

1. The false representation by defendant to plaintiffs that it would not assert a statute of limitations defense.

2. The defendant in truth and in fact did not intend to reconsider the claims of the plaintiffs but to assert a statute of limitations defense.

3. The representations were made with the intent to defraud and lead the plaintiffs to act in the manner alleged.

4. Plaintiffs' ignorance of the falsity of the representations and in reliance thereof their refraining from the pursuit of their claims under the bond. The reliance was justified because of the fiduciary relationship.

5. Plaintiffs, because of the fiduciary relationship, were never aware of any facts that made plaintiffs suspicious.

6. The acts of the defendant were intentional and deliberate.

7. Plaintiffs' compensatory damage is equal to the benefits payable under the bond, plus interest thereon.

8. Plaintiffs' physical and emotional injury.

9. Plaintiff James Lee Jones' (hereinafter referred to as "Jones") medical expenses occasioned by the fraud.

10. Plaintiff Jones' loss of income and future loss of income.

11. The plaintiffs' need to retain attorneys.

12. The defendant's conduct was despicable, fraudulent and done with a conscious disregard of plaintiffs' rights.

It is hence apparent from the allegations that plaintiffs' basic compensatory damages are the benefits payable under the bond, plus interest; in addition, plaintiffs seek punitive damages and damages for emotional distress, personal injuries and attorneys' fees.

The answer of St. Paul to the second amended complaint constitutes a general denial and alleges the following affirmative defenses:

1. Lack of jurisdiction of the subject matter.

2. The statute of limitations.

3. Failure to state facts sufficient to constitute a cause of action.

4. Plaintiffs' damage, if any there be, was caused by their failure timely to file in the proper court.

5. Plaintiffs' damage, if any there be, was caused by their own negligence in failing properly to perfect their claim.

6. Plaintiffs' conduct in pressing the instant allegations in view of their failure to comply with the legal requirements to perfect their claim constitutes comparative bad faith.

7. Defendant's entitlement to a set-off for payment made to plaintiffs' suppliers, materialmen and subcontractors.

8. Defendant's entitlement to a set-off by reason of plaintiffs' default.

Defendant, after having demurred twice raising, *inter alia,* the jurisdictional defense, answered alleging lack of subject matter jurisdiction and moved to dismiss for lack of jurisdiction of the subject matter, supported by declarations establishing that the bond sued upon is a Miller Act bond. (App. A-4) The court nonetheless denied the motion to dismiss. (App. A-1.) From this order, petitioner sought a writ of mandate, prohibition or other relief in the California Court of Appeal. After briefing by the parties, the Court of Appeal on July 31, 1990, summarily denied the petition (App. A-2.) On August 9, 1990, petitioners filed a petition for review in the California Supreme Court which, after opposition and reply, was summarily denied on September 19, 1990. (App. A-3.) From this denial petitioner seeks review.

STATE OF PROCEEDINGS

Petitioner raised the federal jurisdictional issue in its initial demurrer to the original complaint which was sustained with leave to amend, in its demurrer to the first amended complaint which as to this issue was overruled, in its answer to the second amended complaint filed after the sustaining of defendant's demurrer on other issues, and by motion to dismiss for lack of jurisdiction of the subject matter, which was denied. This ruling, as to which the court of appeal and the Supreme Court denied relief, is the basis for the present petition for certiorari. There have been no further proceedings.

ARGUMENT

A. THE COURT LACKS JURISDICTION

1. Defendant has properly raised the jurisdictional issue in the trial court

A motion to dismiss for lack of jurisdiction is a proper way to raise the issue of the court's jurisdiction. 2 Witkin, *California Procedure*, Jurisdiction, Section 320 (3d Ed. 1985); *See, Estate of Crisler*, 97 Cal.App.2d 198, 199-200, 217 P.2 470 (1950); *Estate of Crisler*, 83 Cal.App.2d 431, 432-433, 188 P.2 772 (1948). Petitioner made such a motion in the trial court. The jurisdictional issue is hence properly before this court.

2. The court lacks jurisdiction of the subject matter of the first cause of action

Section 270(b) of the Miller Act (40 U.S.C. § 270(b) (amended 1959)) provides in pertinent part:

> (b) every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed *and not elsewhere*, irrespective of the amount in controversy in such suit . . . (Emphasis added.)

This language has been construed uniformly to provide that the United States District Courts have exclusive jurisdiction over a Miller Act claim against a surety. *United States to the Use and Benefit of Bryant Electric Co. v. Aetna Casualty and Surety Co.*, 297 F.2d 665, 667 (2nd Cir. 1962) (". . . 40 U.S.C. § 270(b) vests exclusive jurisdiction over suits on Miller Act bonds in the Federal Courts . . ."); *Koppers Company, Inc. v. Continental Casualty Company*, 337 F.2d 499, 500 (8th Cir. 1964) (". . . We are confronted here with the question of whether § 2(b) of the Miller Act, 40 U.S.C. § 270(b)(b) applies to a claimant's suit on a Capehart Act payment bond so as to vest jurisdiction of the action exclusively in the appropriate federal court and to deny it to the state court.") State courts are thoroughly without jurisdiction over the surety. *United States for the Use and Benefit of Harvey Gulf International Marine, Inc. v. Maryland Casualty Co.*, 573

F.2d 245, 247 (5th Cir. 1978) (State court lacks jurisdiction so that filing of suit in it did not toll the Miller Act statute of limitations); *Powers Systems, Inc. v. Stallings & McCorvey, Inc.*, 454 So.2d 736, 737 (Fla. App. 2 Dist. 1984). ("However, under the Miller Act, the surety cannot be named as a party in a state court action, is not permitted to intervene in the state court action, and is not bound by the state court judgment.") *Ukropina-Polich-Kral v. Superior Court*, 186 Cal.App.2d 299, 300-302, 8 Cal.Rptr. 692 (1960).

It seems clear that the compensatory damages sought in the first cause of action (and for that matter in the second and third causes of action) are based on the bond which real parties in interest do not deny was issued pursuant to the Miller Act, (*see also*, original and reply Declarations of Bruce Reed and within the exclusive jurisdiction of the United States District Court and not the state courts.

It is anticipated that plaintiffs will urge that they are pursuing an oral contract made under state law. Despite this contention, plaintiffs on each of their causes of action will have to prove the Miller Act bond, that they furnished labor and materials to Feinstein Construction Company, petitioner's principal, and they have not been paid. These are Miller Act issues. What plaintiffs allege, however, is an agreement between the parties that plaintiffs would forebear from filing suit while the government was investigating the claim, in return for St. Paul's alleged reconsideration of the claim and agreement not to plead the statute of limitations. Under very similar allegations, courts have indicated that the court's jurisdiction was based on the Miller Act. *United States for the Use of E. E. Black Limited v. Price MacNamar Construction Co.*, 320 F.2d 663, 664-666 (9th Cir. 1963) ("This is a suit . . . brought pursuant to the Miller Act 40 U.S.C. § 270(a)"); *United States for the Use of Nelson v. Reliance Insurance Co.*, 436 F.2d 1366, 1367, 1370 (10 Cir. 1971) ("The problem that first confronts us is whether, in the Miller Act suit, a surety may be estopped from defending on the ground that the action was not commenced within the time specified in 40 U.S.C. § 270b(b)"). Cf., *United States for the Use of Texas Bitulithic*

Co. v. Fidelity and Deposit Co. of Maryland, 813 F.2d 697, 700 (5th Cir. 1987).

Since, on the basis of the authorities cited above, a finding of jurisdiction under the Miller Act is necessarily a finding of exclusive federal jurisdiction in the federal courts, these cases also hold implicitly that state courts have no jurisdiction over allegations of an agreement not to assert the statute of limitations on a Miller Act claim.

Furthermore, the statute of limitations in 40 U.S. Code § 270(b) is a federal statute of limitations and the computation of the limitations period, including what will toll it, is a question of federal law. *United States for the Use and Benefit of Harvey Gulf International Marine, Inc. v. Maryland Casualty Co.* 573 F.2d 245, 247 (5th Cir. 1978); *United States for the Use and Benefit of Bernard Lumber v. Lanier-Gervais* 896 F.2d 162, 164 (5th Cir. 1990) ***The contention that a contract not to assert the statute of limitations is a state law contract is hence erroneous and the contract is specifically subject to the Miller Act and exclusive federal jurisdiction.***

Petitioner did not waive its jurisdictional objection by failure to remove to federal court, as real parties in interest contended below. Jurisdiction cannot be conferred by consent, or waiver or estoppel. *Louisville and Nashville Railroad Company v. Mottley* 211 U.S. 149, 151, 29 S.Ct. 42, 53 L.Ed. 126 (1908); *Bender v. Williamsport Area School District* 475 U.S. 534, 541, 89 L.Ed. 2d 501, 106 S.Ct. 1326 (1986); *Summers v. Superior Court*, 53 Cal. 2d 295, 298, 1 Cal.Rptr. 324, 347 P.2d 668 (1959). Furthermore, if removal would cure the jurisdictional defect, 28 U.S.C. 1441c (as amended 1988), it would follow that without removal the jurisdictional defect remains. Real parties' in interest contention raised below ignores this rule.

3. The court lacks jurisdiction over the subject matter of the second and third causes of action

It has been seen that the calculation of the limitations period including what tolls it is a federal question arising under the Miller Act so that these causes of action alleging a contract not to plead the statute of limitations under the Miller Act are exclu-

sively federal. *United States to the Use and Benefit of Harvey Gulf International Marine, Inc. v. Maryland Casualty Co.* 573 F.2d 245, 247 (5th Cir. 1978); *United States for the Use and Benefit of Bernard Lumber v. Lanier-Gervais* 896 F.2d 162, 164 (5th Cir. 1990).

Alternatively, the second and third causes of action are each premised upon plaintiffs' having a valid claim payable under the bond. (Second cause of action, paragraphs 20, 25; third cause of action, paragraphs 33, 38.) Under both causes of action, plaintiffs to prevail will have to prove the Miller Act bond, that they provided materials to petitioner's principal Feinstein Construction Company, and that they are unpaid. These are Miller Act issues and the exclusive determination of such issues, it has been seen above, is in the United States District Court. **It should be noted that this court has never decided whether claims of the nature of those set forth in the second and third causes of action may be asserted by Miller Act claimants.** It is unnecessary to decide this issue because if there is no right to make such claims, plaintiffs' action is a pure Miller Act action and if there is such a right, the jurisdiction lies exclusively with the United States District Court. Lower court authority on this issue is illuminating. In *K-W Industries v. National Surety Corp.*, 855 F.2d 640 (9th Cir. 1988) and *Alvarez v. Insurance Co. of North America*, 667 F.Supp. 689 (N.D. Cal. 1987), the court allowed a state law bad faith action *subsequent to the resolution of a federal court Miller Act action.*[1] That this distinction is important is shown by the *Alvarez* case where the court initially dismissed a bad faith claim filed with the Miller Act claim in federal court on the grounds that such relief was not available under the Miller Act and allowed the bad faith

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[1] The opinion in *K-W Industries v. National Surety Corp.* 855 F.2d 640 (9th Cir. 1988) was very sharply criticized in *United States of America for the Use of Pensacola Construction Co. v. St. Paul Fire and Marine Insurance Company* 710 F.Supp. 638 (W.D. La. 1989), the court pointing out that the venue requirement of the Miller Act 40 U.S.C. § 270(b) was designed to protect the surety from suits in multiple jurisdictions such that its liability would exceed the face amount of the bond. This reasoning compels the results sought by petitioner in this proceeding.

claim only after resolution of the Miller Act claim. *Id.* at 690-691. This is not a coincidence. If, for example, actions like those alleged in the second and third causes of action were allowed to be brought in state court before a determination of Miller Act liability in federal court, under state law in all probability they would be conclusive of the federal issue and, hence, subversive of the exclusive jurisdiction of the district court over Miller Act cases. Additionally, since the federal courts will presumably not recognize such determination, there could be a multiplicity of litigation with conflicting results.

CONCLUSION

For the reasons stated, there is a clear conflict between the ruling of the California Supreme Court in this case and the cited opinions of the Courts of Appeal on a federal question. The petition for certiorari should be granted and the court should order the respondent superior court to dismiss the case for lack of subject matter jurisdiction.

DATED: October 29, 1990

Respectfully submitted,

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Appendix A

California Superior Court
City And County Of San Francisco
Department Number Nine
No. 860-196

James Lee Jones; George Edward Wilson;
Far West Painting and Construction;
and Percell-Jones Construction,
Plaintiffs,

vs.

St. Paul Fire and Marine Insurance
Company and Does 1 to 100 inclusive,
Defendants.

[Filed April 17, 1990]

ORDER RE MOTION TO DISMISS

Defendant St. Paul Fire and Marine Insurance Company's motion to dismiss, heretofore submitted, is denied.

Plaintiffs' request for sanctions under Code of Civil Procedure section 1008 is denied.

DATED: April 16, 1990.

IRA A. BROWN, JR.
Ira A. Brown, Jr. /s/
Judge of the Superior Court

Appendix B

Court Of Appeal Of The State Of California
In And For The
First Appellate District
Division: 5

St. Paul Fire & Marine Ins. et al.,

vs.

Superior Court, San Francisco County
Jones, James Lee et al.,
A049489
San Francisco County No. 860196

[Filed July 31, 1990]

By The Court:

The petition for writ of mandate or prohibition is denied.

Dated: July 31, 1990.

LOW, P.J.

(Before Low, P.J., King, J. and Haning, J.)

Appendix C

Order Denying Review
After Judgment By The Court Of Appeal

First Appellate District,
Division Five, No. A049489
S016973

In the Supreme Court
of the
The State of California

In Bank

St. Paul Fire and Marine Insurance Co.,
Petitioner,

v.

San Francisco County Superior Court,
Respondent,

James Lee Jones, et al.,
Real Parties In Interest.

Petition for review DENIED.

LUCAS
Chief Justice

Appendix D

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Superior Court of the State of California
County of San Francisco

James Lee Jones; George Edward Wesson;
Far West Painting and Construction; and
Percell-Jones Construction,
Plaintiffs,

vs.

St. Paul Fire and Marine Insurance Company; and
Does 1 to 100, inclusive,
Defendant.

[Filed Dec 27 1989]

Case No. 860 196

Notice of Motion and Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter

Date: January 26, 1990
Time: 9:30 a.m.
Dept: 9
Trial Date: Not Set.

To Each Party of Record and to the Attorneys of Record for Each Said Party:

NOTICE IS HEREBY GIVEN that on the 26th day of January, 1990, at 9:30 a.m. or as soon thereafter as the matter can be heard in Department 9 of the Court, City Hall, San Francisco, California 94102, the undersigned attorneys for defendant St.

Paul Fire and Marine Insurance Company will move the Court for an order dismissing the second amended complaint and action for lack of jurisdiction of the subject matter, on the grounds that the action is one under the Miller Act, 40 U.S.C. § 270a *et seq.* and exclusive jurisdiction lies in the United States District Court.

Said motion will be based upon the entire record and file in this matter, the present notice of motion, motion and memorandum of points and authorities and declarations of Bruce Reed and Peter V. Shackter filed herewith.

DATED: December 27, 1989

McCARTHY, FLOWERS & ROBERTS

By: PETER V. SHACKTER
Peter V. Shackter
Attorneys for Defendant
St. Paul Fire & Marine
Insurance Company

Proof of Service by Mail

I declare that I am employed in the City and County of San Francisco, California.

I am over the age of eighteen years and not a party to the within entitled action. My business address is One California Street, Suite 2750, San Francisco, California 94111.

I am readily familiar with McCarthy, Flowers & Roberts' practice for collection and processing of correspondence for mailing with the United States Postal Service.

On December 27, 1989, I served the attached NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER on the following in said cause, by placing it for deposit with the United States Postal Service on this day, in the ordinary course of business, a true copy thereof enclosed in a sealed envelope. The envelopes were addressed as follows:

Patrick E. Catalano, Esquire
Law Offices of Patrick E. Catalano
One Maritime Plaza, Suite 2250
San Francisco, California 94111

Michael J. Guglielmino, Esquire
Williams & Martinet
150 Spear Street, Suite 110
San Francisco, California 94105

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was executed at San Francisco, California, on December 27, 1989.

VANESSA S. HADADY
Vanessa S. Hadady

Appendix E

The Miller Act

§ 270a. Bonds of contractors of public buildings or works

(a) Type of bonds required

Before any contract, exceeding $25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,0000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) Waiver of bonds for contracts performed in foreign countries

The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

§ 270b. Rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claims is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was

supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

(Aug. 24, 1935, c. 642, § 2,49 Stat. 794; Aug. 4, 1959, Pub.L. 86-135, § 1, 73 Stat. 279.)

(c) Authority to require additional bonds

Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Coverage for taxes in performance bond

Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under Title 26. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such such suit shall be commenced after the expiration of one year after the day on which such notice is given.

(Aug. 24, 1935, c. 642, § 1, 49 Stat. 793; Nov. 2, 1966, Pub.L. 89-719, Title I, § 105(b), 80 Stat. 1139; Nov 2, 1978, Pub.L. 95-585, 92 Stat. 2484.)